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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 831

FRANCIS EDDIE SPECHT,

Petitioner,

v.

WAYNE K. PATTERSON, Warden, et al.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONER

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Opinion Below

There are two reported opinions of the Colorado Supreme Court relating to the constitutionality of Petitioner's imprisonment under the challenged statute. They are *Specht* v. *Tinsley,* 153 Colo. 235, 385 P.2d 423 (1963), and *Specht* v. *People,* 156 Colo. 12, 396 P.2d 838 (1964) (R. 24-27). The opinion of the United States District Court is unreported but appears in the record (R. 39-41). The opinion of the Court of Appeals (R. 48-51) is *Specht* v. *Patterson,* 357 F.2d 325 (10th Cir. 1966).

Jurisdiction

The jurisdiction of this Court was invoked pursuant to 28 U.S.C. § 1254(1) by Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit. On March 31, 1965, Petitioner filed a Petition for Habeas Corpus in the United States District Court for the District of Colorado (R. 1-23). The Petition was denied without an evidentiary hearing on July 21, 1965 (R. 39-44). The judgment of the District Court was affirmed on appeal by the United States Court of Appeals for the Tenth Circuit on February 21, 1966 (R. 48-51). Petitioner's Motion for Rehearing was filed on March 7, 1966 (R. 52-54), and denied on March 23, 1966, by the Court of Appeals (R. 55). The Petition for Writ of Certiorari was filed in this Court on June 3, 1966, and the case was docketed June 6, 1966, as No. 1782 Misc., Oct. Term, 1965. On December 5, 1966, the Petition and accompanying motion for leave to proceed *in forma pauperis* were granted. *Specht* v. *Patterson*, 87 Sup. Ct. 516 (1966) (R. 57).

Question Presented

The Colorado Sex Offenders Sentencing Act allows a person convicted of a crime for which the maximum sentence is ten years to be sentenced for an indeterminate term of from one day to life upon a finding by the court that a person so convicted constitutes, if at large, a threat of bodily harm to members of the public, or is an habitual offender and mentally ill. The question presented is whether the statute is invalid under the due process clause

of the fourteenth amendment to the United States Constitution because it allows that finding to be made:

(a) Without a hearing at which the person so convicted may confront and cross-examine adverse witnesses and present evidence of his own by use of compulsory process, if necessary.

(b) On the basis of hearsay evidence which the person is not entitled to see.

Statute Involved

The Colorado Sex Offenders Sentencing Act, Colo. Sess. Laws 1953, ch. 89, §§ 1-10, at 249-52, as amended, Colo. Sess. Laws 1957, ch. 122, § 1, now COLO. REV. STAT. ANN., §§ 39-19-1 to -10 (1963) (herein called the Colorado Sex Offenders Sentencing Act or the Sex Offenders Statute).

Statement

Francis Eddie Specht was convicted by a jury in Jefferson County District Court of the crime of indecent liberties on August 20, 1959 (R. 1, 29). That crime is defined in COLO. REV. STAT. ANN., § 40-2-32 (1963), as amended, Colo. Sess. Laws 1965, ch. 131, § 1, at 505, which provides for a maximum sentence of ten years in the penitentiary. He was not sentenced under the indecent liberties statute. After his conviction, he was examined at Colorado Psychopathic Hospital, pursuant to the sex offenders statute challenged in this case. The psychiatric report was prepared and given to the trial judge (R. 7). Thereafter, on November 23, 1959, Specht was sentenced to the state penitentiary under the sex offenders statute (R. 1). The sen-

tence was for an indeterminate term of from one day to life. He remained in the state penitentiary until May 4, 1964, when he was transferred to the Colorado State Hospital.

The following additional facts pertinent to this case are stated in Paragraph 11 of Petitioner's verified habeas corpus petition (R. 3-19). The reports of the psychiatrists were made available to the court and to Petitioner's counsel, but Petitioner was never allowed to see them although he attempted to do so (R. 7). There was no hearing on the question of whether Petitioner was subject to being sentenced under the sex offenders statute (R. 7). Although these statements are the subjects of a general denial by the State, the State has never suggested that there was a hearing on whether Specht was subject to sentence under the sex offenders statute. The State has consistently maintained that the statute does not require such a hearing and that Specht is not entitled to one by reason of any requirements of due process.

Summary of Argument

In Colorado, certain sex crime convictions authorize the sentencing court to initiate procedures which may lead to sentencing under the Colorado Sex Offenders Sentencing Act. The only sentence provided for by the sex offenders statute is an indeterminate sentence of from one day to life. In 1959, the crimes enumerated in the statute were indecent liberties, incest, assault with intent to commit unnatural carnal copulation, and assault with intent to commit rape. Other statutes fix a maximum term of imprisonment which may be imposed upon conviction for each enumerated crime.

The conviction of an enumerated crime is not, by itself, a sufficient basis to commit the person so convicted under the sex offenders statute. Before the judge may sentence under the sex offenders statute, he must make a finding of fact that the person so convicted "constitutes a threat of bodily harm to members of the public, or is an habitual offender and mentally ill, . . . " (39-19-1). It is only when a finding is made that a person so convicted has these characteristics or defects that the statute gives the court authority to treat him differently from others convicted of the same crime and to confine him for life with the possibility of release only if "the interests of justice and the welfare of society may dictate. . . . " (39-19-7).

Whether a person falls within one of the classifications is essentially unrelated to the question of his conviction of the enumerated sex crime. Because of the drastic difference in sentencing between those who fall within the classification of Section 39-19-1 of the sex offenders statute and those who do not, it is essential that this critical fact be found but with the use of procedures which meet the tests of due process of law. It is the absence of such procedural safeguards that makes the Colorado Sex Offenders Sentencing Act invalid for failure to provide the due process of law required by the fourteenth amendment to the United States Constitution. This statute allows the finding to be made:

(a) Without a hearing at which the person so convicted may confront and cross examine adverse witnesses and present evidence of his own by use of compulsory process, if necessary.

(b) On the basis of hearsay evidence which the person is not entitled to see.

The Colorado Supreme Court appears to have relied upon this Court's decision in *Minnesota ex rel. Pearson* v. *Probate Court* in its decision about the constitutionality of the statute. *Pearson* does not sustain a statute such as Colorado's which has none of the procedural safeguards recited with approval by this Court in that decision.

The failure to provide procedural safeguards is defended by the State by characterizing the procedure by which determination is made as a sentencing procedure and relying upon *Williams* v. *New York* as justifying the absence of due process. This is a misplaced reliance. As written and as interpreted by the Colorado Supreme Court it is clear that the statute requires that the trial judge judicially find facts as a prerequisite to committing a person under the sex offenders statute. This is a distinctly different judicial function from the exercise of discretion considered in *Williams* v. *New York*. Furthermore, the practical considerations discussed in *Williams* are insignificant here.

I. A Person Sentenced Under the Sex Offenders Statute Is Deprived of His Liberty to a Much Greater Degree Than a Person Sentenced for the Same Crime Under the Criminal Statute. The Decision Whether the Facts Allow This Different Disposition Must Be Attended by Traditional Due Process Procedural Protection.

Central to the constitutional objection to the Colorado Sex Offenders Sentencing Act is the fact that those persons found to be within the classifications subject to sentencing under the statute are deprived of their liberty to a substantially greater degree than those not found to be within its classifications.

The inquiry whether a person is within the classifications commences only upon conviction of one of the enumerated crimes. In the case of a person convicted of the crime of indecent liberties, if the determination is that he is not within the classifications of the sex offenders statute, the maximum period for which he may lose his liberty (disregarding questions about the effect of the good time statute, COLO. REV. STAT. ANN., §§ 105-4-4 to -7 (1963)) is ten years. At the end of a sentence his right to freedom is absolute and requires nothing but noncriminal behavior on his part and the passage of time. The maximum duration for his involuntary confinement is exactly measurable and readily ascertainable from the moment sentence is passed.

Contrasted with this is the person convicted of the same crime who is found to fall within one of the classifications of the sex offenders statute. He receives the only sentence provided by the statute, an indeterminate sentence of from one day to life (39-19-1). For the remainder of his life his only chance to receive absolute freedom is if the Parole Board feels that the interest of justice and the welfare of society dictate such a release (39-19-7). He may also be paroled, but this is supervised freedom only and he is subject at any time to recommitment by the Parole Board (39-19-7).

The classifications in which a court must find a person convicted of an enumerated crime before he is subject to sentencing under the sex offenders statute are found in Section 39-19-1 of the Act. He must constitute a threat of bodily harm to members of the public, or be an habitual offender and mentally ill. The determination of whether a person so convicted falls within one of these classifica-

tions is made by the district judge. In doing so, he is judicially finding a fact, and is not exercising discretion. *Vanderhoof* v. *People*, 152 Colo. 147, 380 P.2d 902 (1963).

But in Colorado under the sex offenders statute this "finding of fact" is made after a completely summary proceeding. The procedure is invoked after conviction. The district court initially has discretion whether to commence the inquiry into whether a convicted person should be sentenced under the sex offenders statute. *Hawkins* v. *People*, 131 Colo. 281, 281 P.2d 156 (1955). Once the inquiry is initiated, the convicted person must be examined by psychiatrists who report in writing to the court (39-19-2). The court also receives a presentence investigation report prepared by the Probation Department (39-19-5(4)). With this data he must make a finding of fact as to whether the convicted person fits one of the classifications designated by the legislature. *Vanderhoof* v. *People*, 152 Colo. 147, 380 P.2d 903 (1963). Apparently *thereafter* he may have discretion to sentence under the sex offenders statute (39-19-5(1)). But see *United States* v. *Maroney*, 355 F.2d 302, 312 (3d Cir. 1966) (one day to life sentence is mandatory on finding that convict is a threat of bodily harm—dictum).

The critical determination turns entirely upon the finding of the judge based upon evidence untested by the hearing process. No hearing is required prior to the determination. The accused's counsel is not guaranteed the right to call witnesses who might rebut the information reported by the examining psychiatrist or to rebut any other information before the court. There is no right to cross-examine the psychiatrist or others supplying facts to the court, nor any right to require witnesses to appear to explain their reports, nor even a requirement that the

reports be disclosed to the prisoner. There is no requirement of detailed or written findings to facilitate intelligent review. Yet on the basis of this procedure a man subject to a maximum sentence of ten years may be imprisoned for a maximum of life. Thereafter his fate is wholly within the power of the Parole Board (39-19-6 to -9).

On its face a procedure which results in such a sharp additional curtailment of a man's liberty must include a formal hearing, with notice of the charge, with the right to hear the evidence, with the opportunity to test the evidence by cross-examination and to rebut it with other evidence.

This Court has emphasized the degree to which the right to hear the evidence and test it by cross-examination is recognized as essential to a fair trial in *Pointer* v. *Texas*, 380 U.S. 400, 405 (1965):

> There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expression of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, we have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law. . . .

This Court has likewise recognized that notice is essential in order that there be fair opportunity to meet the charge, *Oyler* v. *Boles*, 368 U.S. 448 (1962), *Chandler* v. *Fretag*, 348 U.S. 3 (1954), and has very recently stressed

the importance of requiring that a judge state his findings. *Kent* v. *United States*, 383 U.S. 541 (1966).

Even where proceedings are civil and not criminal the Court has said:

> [M]anifestly there is no hearing when the party does not know what evidence is offered or considered and is not given an opportunity to test, explain, or refute. . . All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. . . .

Interstate Commerce Comm'n v. *Louisville & N.R.R.*, 227 U.S. 88, 93 (1913).

II. Because of the Essentially Independent Nature of Finding That Convict Constitutes a Threat of Bodily Harm or Is an Habitual Offender and Mentally Ill, and Because of the Result of Such a Finding, the Sex Offenders Statute Defines a New Criminal Status and Full Procedural Protection Is Essential in Making the Finding That a Convict Is Within the Listed Classes.

The State of Colorado seeks to defend its failure to provide procedural protection for the process by which this critical determination is made by calling it a sentencing procedure and citing this Court's opinion in *Williams* v. *New York*, 337 U.S. 241 (1949). It is Petitioner's contention that this is essentially a separate criminal proceeding. It begins with a conviction, and, when an additional fact is found, ends in a drastically greater punish-

ment than that authorized for the conviction. This view was unanimously taken by a distinguished court of appeals, in *United States* v. *Maroney,* 355 F.2d 302 (3d Cir. 1966).

The question whether a person constitutes a threat of bodily harm to members of the public, or is an habitual offender and mentally ill is independent of the finding of guilt or innocence of an enumerated crime. The sex offenders statute does not make commission of an enumerated crime the basis for sentencing. It makes conviction a basis for commencing inquiry whether a person constitutes a threat of bodily harm to the public or is an habitual offender and mentally ill. It is clear from the statute as written and as construed that this is a fact finding proceeding, *Vanderhoof* v. *People,* 152 Colo. 147, 380 P.2d 903 (1963). It is equally clear that the fact which must be found is different from and additional to the fact that he was convicted of a crime. See *United States* v. *Maroney,* 355 F.2d 302 (3rd Cir. 1966).

In *United States* v. *Maroney,* 355 F.2d 302 (3d Cir. 1966), the Third Circuit considered the Pennsylvania Barr-Walker Act. Pa. Stat. Ann., tit. 19, §§ 1166-1174 (1958). In all material respects, that statute is identical with the original Colorado statute enacted in 1953. The same classification was required to be made in both Acts, the same procedures were followed in making it and the determination that a convicted person fell within the classification resulted in the same indeterminate sentence of from one day to life under the sex offenders statute, rather than under the statute under which he was convicted. The Third Circuit viewed the statute as basically a criminal statute. They said at page 309:

> The Act leaves no doubt, both in its language and its purpose, that it is a criminal statute and that what is imposed under its authority is criminal punishment. Its title and its text are replete with language which reveals that the proceeding is penal in nature. It may be invoked only after a precedent conviction of guilt of one of the specified crimes and prescribes a new and radically different punishment. A maximum sentence of life imprisonment is made mandatory and from it the defendant may only be released on the determination of the Pennsylvania Board of Parole that the 'interest of justice' so dictates. It is true that the Act provides for periodic psychiatric and psychological examinations which the Board of Parole is to review. But it is no less a criminal proceeding and no less the infliction of a criminal punishment because the Act provides for such studies, especially when this is accompanied by the drastic potential of life imprisonment if they do not affirmatively provide a basis for release. This criminal punishment does not lose its characteristic because the Act goes beyond simple retribution. . . .

The Third Circuit concluded that since the statute was penal in nature, the hearing to determine whether it was applicable to a particular person was essentially a criminal proceeding. The Court said, at page 312:

> It is a separate criminal proceeding which may be invoked after conviction of one of the specified crimes. Petitioner therefore was entitled to a full judicial hearing before the magnified sentence was imposed. At such a hearing the requirements of due process cannot be satisfied by partial or niggardly procedural protections.

> A defendant in such a proceeding is entitled to the full panoply of the relevant protections which due process guarantees in state criminal proceedings. He must be afforded all those safeguards which are fundamental rights and essential to a fair trial, including the right to confront and cross-examine the witnesses against him. . . .

In the State of Colorado's response to Specht's Petition for Writ of Certiorari, the State has taken a position with regard to the purpose of the sex offenders statute that is remarkably similar to the view of the Third Circuit. They say at page 3 of their response:

> At the same time, it is equally clear that the Colorado Statute imposes a type of punishment for a person *already convicted* of one of certain named offenses. Thus, the Colorado Statute does not, in and of itself, provide the basis for commitment. This is true because the basis for commitment—a finding of guilt—has already been determined prior to the time when the Colorado statutory proceedings are employed.

Although the Attorney General has misconstrued the Colorado statute when he says that the basis for commitment is the finding of guilt of one of the listed offenses, his statement of the purpose of the Act illuminates Colorado's view of the statute and indicates that the State so construes it in denying due process on the basis of *Williams* v. *New York.*

In addition to the statements by the Attorney General about the purpose of the statute, a review of the Colorado Sex Offenders Sentencing Act supports the conclusion that

it is essentially penal in nature. In the law as enacted in 1953, the purpose was said to be for the more efficient "punishment, treatment and rehabilitation of persons convicted [of the enumerated crimes] . . . " The second section still recites that "no person, convicted of a crime *punishable* in the discretion of the District Court under the provisions of this Article . . . . [shall be sentenced under the Act until psychiatric examination is conducted and report made thereon]" (39-19-2). (Emphasis added.) The Act refers to the commitment of persons under this statute as a sentencing of these persons which carries the implication that the statute is punitive. Finally, the Act makes clear that the penitentiary is an appropriate place of confinement under the Act (39-19-5, 39-19-6(2)).

The 1957 amendment modified the above-cited language in only one respect. The word "punishment" in Section 39-19-1 was changed to "control."

The Colorado Supreme Court also appears to regard the statute as a punishment statute. In *Trueblood* v. *Tinsley*, 148 Colo. 503, 509, 366 P.2d 655, 659 (1961), *cert. denied*, 370 U.S. 929 (1962), the court in considering whether the application of the sex offenders statute resulted in the denial of equal protection because of the differential in sentences which might be imposed, said:

> Generally, statutes which prescribe different *punishments* for the same violations committed under the same circumstances by persons in like situations are void as violative of equal protection of the laws. (Emphasis added.)

The Court then justified the statute on the ground that there was a reasonable classification to justify the different treatment.

It has already been pointed out that when the court finds a person within a classification of the Act, the sex offenders statute authorizes the imposition of a substantially greater punishment than the statute defining the offense for which the jury convicted that person. The judge's finding that the convicted person fits the classification of the sex offenders statute is therefore equivalent to a finding that he has committed a more serious crime than the crime for which he was convicted. The hearing which supports such a finding must be attended by the guarantees of due process consistent with such a drastic result.

A further constitutional question raised by the State's position that the statute is penal is the question whether the statute punishes the status of being mentally ill. Mental illness is an essential element which must exist for a person to fit one of the classes outlined in the statute. If one who fits the class incurs greater punishment, this may constitute cruel and unusual punishment. *Robinson* v. *California,* 370 U.S. 660 (1962). This issue was not raised in the Petition for Writ of Certiorari and will not be argued by Petitioner, but it is suggested here that such a question may exist in light of the State's interpretation of the Act.

III. If the Colorado Sex Offenders Statute Is Characterized as a Sexual Psychopath Statute, It Is Nevertheless Invalid for Failing to Provide Constitutionally Adequate Procedural Safeguards for the Process of Determining Whether the Statute Is Applicable to a Particular Individual.

The State has contended that the Colorado Sex Offenders Statute is punitive. This position raises serious constitutional questions which are dealt with in the previous portions of this brief. It must be noted, however, that the only significant authority the Colorado Supreme Court has cited to uphold the constitutionality of the sex offenders statute is the case of *Minnesota ex rel. Pearson* v. *Probate Court,* 309 U.S. 270 (1940). Thus, the Colorado Supreme Court appears to feel that the constitutional tests to be applied to the sex offenders statute are those referred to by this Court in the *Pearson* case.

The Minnesota sexual psychopath statute differs in many respects from the type of statute considered in this case and in *United States* v. *Maroney,* 355 F.2d 302 (3d Cir. 1966) (Pennsylvania). There are, moreover, wide variations in the statutes which have been classified as sexual psychopath statutes. See *Sexual Psychopath Statutes: Summary and Analysis,* 51 J. Crim. L., C. & P.S. 215 (1960). Petitioner adheres to his view that the Colorado statute, like the one construed in *Maroney,* provides for a separate criminal proceeding and therefore must also provide the procedural rights associated with criminal trials.

It is true that a comparison of the purposes and functions of the Colorado Sex Offenders Statute with the Minnesota type of statute indicates some similarities. Al-

though the Colorado statute is labeled a Sex Offenders Sentencing Act, not all persons convicted of the enumerated crimes are sentenced under the Act. See *Swanson* v. *People*, 155 Colo. 19, 392 P.2d 163 (1964). Conviction for an enumerated sex crime may establish a preliminary basis for further investigation to determine whether a convicted person should be committed for an indeterminate period. The investigation has as its goal a factual determination whether the person constitutes "a threat of bodily harm to members of the public, or is an habitual offender and mentally ill" (39-19-1). *Trueblood* v. *Tinsley*, 148 Colo. 503, 366 P.2d 655 (1961), *cert. denied*, 370 U.S. 929 (1962); *Sutton* v. *People*, 156 Colo. 201, 397 P.2d 746 (1964); *Ray* v. *People*, 415 P.2d 328 (Colo. 1966). Confinement and treatment, the dual purposes of the sexual psychopath statutes, Ploscowe, *Sex Offenses: The American Legal Context*, 25 LAW & CONTEMP. PROB. 217, 223 (1960), are likewise the dual purposes of the Colorado statute, which recites as its purposes "control, treatment and rehabilitation" (39-19-1). Like the sexual psychopath statutes, the Colorado statute provides for an indefinite term of confinement and indicates the desirability of medical diagnosis, treatment and periodic review of the condition of the person confined (39-19-1, 39-19-2, 39-19-4, 39-19-6). The critical classification in the Colorado statute—"a threat of bodily harm to members of the public, or is an habitual offender and mentally ill"—is vague and the statute does not define any of its terms. It is, however, probably about as precise as many of the definitions of sexual psychopaths, most of which have been criticized as unscientific and medically unmeaningful. See Hacker and Frym, *The Sexual Psychopath Act in Practice*, 43 CALIF. L. REV. 766 (1955); DiFuria

& Mees, *Dangerous to Be at Large*, 38 WASH. L. REV. 531 (1963); Kamman, *Evolution of Sexual Psychopath Laws*, 6 J. FOR. SCI. 170 (1961).

But even though there are similarities, the striking difference between the Minnesota statute and the Colorado statute is the total absence from the Colorado statute of the procedural safeguards emphasized by this Court in the *Pearson* opinion.

The provisions of the Minnesota statute which this Court pointed to in *Pearson* as guaranteeing procedural due process were: (1) The facts relied upon for sentencing must be submitted to the County Attorney, who thereupon files a petition in Probate Court signed by a person having knowledge of the facts; (2) the Probate Judge must set the matter down for hearing and for examination of the patient; (3) the patient may be represented by counsel and is entitled to compulsory process to compel the appearance of witnesses; (4) the court must appoint two physicians to examine the patient; (5) the patient has a right to appeal the finding that he has a psychopathic personality. 309 U.S. at 275-276 (1940).

The essential requirements of notice and hearing, which imply the right to confront and cross-examine witnesses, and of compulsory process to compel the appearance of witnesses, are absent from the Colorado statute. Their absence deprives persons subject to commitment under the sex offenders statute of due process of law.

It is sometimes held that a proceeding under a sex offenders statute is a civil rather than a criminal proceeding and that as a consequence the constitutional rights normally guaranteed an accused in a criminal proceeding are

not applicable. See e.g., *ex parte Keddy,* 105 Cal. App. 2d 215, 233 P.2d 159 (Dist. Ct. App. 1951), and Annot., 24 A.L.R.2d 350, 362 (1952). Cf. *People* v. *Frontczak,* 286 Mich. 51, 281 N.W. 534 (1938). But where the ultimate result is involuntary confinement of the person, whatever the legislature labels the statute due process should require a fair procedure for identification of persons whom the state subjects to its police power at the cost of their liberty. In *People* v. *Levy,* 151 Cal. App. 2d 460, 311 P.2d 897 (Dist. Ct. App. 1957), the court in assessing the California version of the Sex Offender Act said:

> Of course even though the Act is civil in nature, it does involve a deprivation of personal liberty, and is necessarily subject to constitutional safeguards. 311 P.2d at 900.

Similarly, in *Gross* v. *Superior Court,* 42 Cal.2d 816, 270 P.2d 1025 (1954), it was held that although such proceedings were civil and collateral to criminal proceedings, they resembled criminal cases in certain features and hence, the prisoner was entitled to bail, entitled to be present at a hearing, and was entitled to counsel.

This Court has recently emphasized that wherever judicial action is critically important in determining individual rights, labeling the proceedings civil will not eliminate the need for appropriate procedural protections. *Kent* v. *United States,* 383 U.S. 541, 86 Sup. Ct. 1045, 1054-1057 (1966).

In the *Pearson* case, the Court stated that it would presume that the state courts would safeguard the constitutional rights of persons subjected to deprivation of liberty

under a sexual psychopath statute. The reported decisions of the Colorado Supreme Court construing the sex offenders statute indicate that that court does not recognize the importance of the procedural safeguards listed in *Pearson*.

The first case to consider the constitutionality of the Colorado Sex Offenders Sentencing Act was *Trueblood* v. *Tinsley*, 148 Colo. 503, 366 P.2d 655 (1961), cert. denied 370 U.S. 929 (1962). Although the only constitutional attack made in *Trueblood* was that the application of the sex offenders act denied the prisoner equal protection of the laws, *Trueblood* has consistently been cited by the court as an answer to all constitutional objections. See *Specht* v. *People*, 156 Colo. 12, 396 P.2d 838 (1964); *Specht* v. *Tinsley*, 153 Colo. 235, 385 P.2d 423 (1963).

In *Trueblood*, the Colorado Supreme Court brushed aside the prisoner's attack on the sex offender statute on the single premise that similar statutes have been upheld in other jurisdictions. The court cited an inapposite Idaho case, *State* v. *Evans*, 73 Ida. 50, 245 P.2d 788 (1952), and the leading case of *Minnesota ex rel. Pearson* v. *Probate Court*, 309 U.S. 270 (1940). The total absence of the procedural safeguards commented on in *Pearson* was not mentioned by the court, and in *Specht* v. *Tinsley*, 153 Colo. 235, 385 P.2d 423 (1963), they summarily rejected petitioner's suggestion that they had misconstrued these cases.

In summary, Petitioner contends that if the Colorado statute is characterized as a sexual psychopath statute, it must fall because it lacks the very procedural safeguards listed by this Court in *Minnesota ex rel. Pearson* v. *Probate Court*, 309 U.S. 270 (1940).

IV. Proceedings Under the Sex Offenders Act Differ So Fundamentally From Ordinary Sentencing Proceedings That Due Process Should Require Procedural Protections Not Ordinarily Accorded a Convicted Person at Sentencing.

The Tenth Circuit held that the decision of this Court in *Williams* v. *New York*, 337 U.S. 241 (1949) was applicable to the Colorado statute here under attack and that due process does not require that procedural rights be made available to a defendant in a sentencing proceeding (R. 50, 51). This proposition is now being argued before this Court by the State (Response of Respondents to the Petition for Writ of Certiorari, 3-4). The petitioner contends that the decision of this Court in *Williams* is not applicable to this case.

In *Williams* the question before the Court related to the rules of evidence applicable to the manner in which a judge may obtain information to guide him in exercising his discretion in imposing sentence. The judge there had an admitted discretion within the limits fixed by statute. The fact of conviction of the crime was the only element necessary to allow the judge to exercise this discretion. As the Court pointed out at 337 U.S. 241, 252 it was conceded that the judge could have exercised his discretion on the basis of any information which he deemed appropriate without describing the source. The Court declined to apply due process procedural concepts to the process by which a judge gathered the information upon which to base his discretionary decision.

Petitioner Specht submits that he was not "sentenced" in the sense that Williams was sentenced by the New York

courts. In *Williams*, the trial judge had the choice of life imprisonment or the death penalty under the New York murder statute. Specht was formally charged, tried and convicted of an offense under the Colorado criminal statute defining the crime of indecent liberties. That statute provides for punishment, for an adult offender, by confinement in the penitentiary for a term of not more than ten years. At a sentencing proceeding strictly parallel with the one in *Williams* the Colorado trial judge could have sentenced Petitioner to a term of one year, or two years, or any number of years up to and including ten. Under such circumstances the rule announced in the *Williams* decision would have been applicable to Petitioner. But the nature of Petitioner's sentencing was entirely different and involved a question not present in *Williams*. He was sentenced without a hearing under another statute for a term with a maximum of more than ten years.

Although the judge under the Colorado statute has discretion whether to initiate the inquiry about the applicability of the Sex Offenders Statute, he must make a finding of fact before he can apply the sentencing procedures of the statute. The Colorado Supreme Court clearly pointed this out in *Vanderhoof* v. *People*, 153 Colo. 147, 380 P.2d 903 (1963). At page 149, the court said:

> • • • plaintiff in error contends that the classification is 'unreasonable, arbitrary and capricious because the classification is determined by the *discretion* of the district court acting solely in its own opinion.' With this contention we cannot agree. The classification is not determined by the trial court. The classification is set out in the act, *and the trial court merely makes a*

> *finding of fact* to determine whether or not defendant comes within the classification. (Emphasis added.)

The fact which must be found is that the prisoner is either (1) a threat of bodily harm to members of the public or (2) that he is an habitual offender and mentally ill (39-19-1). This fact is different and additional to the facts which were the basis of conviction of the enumerated crime. See *United States* v. *Maroney*, 355 F.2d 302, 311-12 (3d Cir. 1966), where the court characterizes similar proceedings under the Pennsylvania Barr-Walker Act as "entirely unlike a sentencing procedure," and holds that due process requires the guarantee of all procedural rights "which are customarily associated with criminal trials."

No such fact finding procedure was essential to the power of the trial court in the *Williams* case to impose a more severe sentence. The *Williams* decision is therefore inapplicable to the question of whether the Colorado Sex Offenders Statute is unconstitutional for failure to provide adequate procedural safeguards for such a fact finding process.

The decision in *Williams* was rested in part on historical grounds, the Court noting, at 337 U.S. 246, that sentencing judges have long exercised great discretion in using information obtained out of court in sentencing. The Court has, however, long recognized that due process is not a static concept frozen in historical practice, but rather, is a flexible one capable of application to newly discovered situations as they arise. *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 895 (1961).

In *Williams*, the Court also pointed out that it might frustrate information-gathering procedures for pre-

sentence reports if the persons giving information had to give it in open court. In the case of the sex offenders statute, the most important data comes from a psychiatrist's report. The psychiatric report has always been a required piece of information to be considered by the court. It is doubtful that a requirement that the psychiatrist appear and testify would frustrate his free inquiry and exercise of his professional judgment.

Additional information comes from a presentence report prepared by the probation department (39-19-5(4)). However, this Court has indicated in *Kent* v. *United States*, 383 U.S. 541 (1966), that counsel for a juvenile was entitled to access to the social records and probation reports considered by the court in deciding whether the juvenile should be subject to juvenile jurisdiction or to adult criminal procedures. Certainly counsel would rebut or impeach inaccurate information therein. Even though this would presumably disrupt information gathering procedures and delay judicial proceedings, nevertheless this Court required such access because of the critical nature of the decision based on that information. The consequence of sentencing under the Sex Offenders Statute is substantially greater than the consequence of sentencing under the violated criminal statute; the protections afforded the Petitioner in the judge's critically important determination of fact should also be substantially greater than at ordinary sentencing.

In *Williams* the Court was careful to say that its decision did not mean that sentencing procedures are immune from scrutiny under the due process clause. 337 U.S. at 252, n. 18 (1949) (citing *Townsend* v. *Burke*, 334 U.S. 736 (1948)). In *Townsend*, the Court condemned sentencing in

reliance on prejudicial misinformation where the prisoner had no counsel to assist him in correcting the misinformation. If due process requires the presence of counsel, to what end does it do so?

> Analysis would indicate that counsel is required at sentencing to assure "fair play," that "fair play" means some sort of hearing, and that a hearing is little more than sham unless it embraces the right to know and thus be able to challenge adverse information.

Note, 101 *U. Pa. L. Rev.* 257, 270 (1952). See *Keenan* v. *Burke,* 342 U.S. 881 (1951) (per curiam); *In re Oliver,* 333 U.S. 257 (1948); cf., *United States ex rel. Almeida* v. *Baldi,* 195 F.2d 815 (3d Cir. 1952), cert. denied 345 U.S. 904 (1953) (due process held denied where evidence material to imposition of penalty was suppressed); Note 58 *Colum. L. Rev.* 702 (1958).

Even in an ordinary sentencing proceeding it may be an essential element of fairness to disclose to defendant the facts on which the judge will rely in sentencing so that the defendant can correct any errors in those facts. See Amendments to Fed. R. Crim. P., 86 Sup. Ct. 236, 238 (1966) (Douglas, J., dissenting).

Even if the sex offender proceeding is regarded as a kind of sentencing proceeding, it is not an ordinary one. If disclosure is important to fair procedure in an ordinary sentencing when the judge is exercising discretion, it would seem to be critically important in the unique proceedings provided for by the Sex Offenders Statute.

Conclusion

For the reasons above stated the Colorado Sex Offenders Sentencing Act should be declared to be unconstitutional on its face; the decision of the Court of Appeals should be reversed; and the case should be remanded with instructions to issue a Writ of Habeas Corpus to secure the discharge of Petitioner from the custody of the Respondent.

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APPENDIX A

Colorado Sex Offenders Sentencing Act

39-19-1. Indeterminate sentences to institutions—For the better administration of justice and the more efficient control, treatment and rehabilitation of persons convicted of the crimes of indecent liberties, incest, assault with intent to commit unnatural carnal copulation, assault with intent to commit rape, if the district court is of the opinion that any such person, if at large, constitutes a threat of bodily harm to members of the public, or is an habitual offender and mentally ill, the district court in lieu of the sentence now provided by law, for each such crime, may sentence such person to a state institution for an indeterminate term having a minimum of one day and a maximum of his natural life.

39-19-2. Requirements before sentencing—No person, convicted of a crime punishable in the discretion of the district court, under the provisions of this article, with imprisonment in a state institution for an indeterminate term having a minimum of one day and a maximum of his natural life, shall be so sentenced until:

(1) A complete psychiatric examination shall have been made of him by the psychiatrists of the Colorado Psychopathic Hospital or by psychiatrists designated by the district court and

(2) A complete written report thereof submitted to the district court. Such report shall contain all facts and findings, together with recommendations as to whether or not the person is treatable under the provisions of this article; Whether or not the person should be committed to the Colorado State Hospital or to the State Home and Training Schools as mentally ill or mentally deficient. Such report shall also contain the psychiatrist's opinion as to whether

or not the person could be adequately supervised on probation.

39-19-3. Sentence postponed—temporary confinement—To enable the district court to procure such a psychiatric examination and to afford time in which to make the same, the district court is hereby authorized and empowered to postpone sentence upon any person convicted of any one or more of the crimes enumerated in section 39-19-1, and to order the person so convicted to temporary confinement in the prison or jail in which such person was confined prior to his trial or would have been confined if not free on bail. Such period of temporary confinement shall not exceed a period of thirty days unless the district court, on the request of the psychiatric examiner, extends the observation period for an additional time not exceeding fifteen (15) days. It shall be the duty of the psychiatrists to examine the prisoner and report to the district court thereon within the period allowed by the district court.

39-19-4. Order—examination—place—Whenever the judge of a district court shall find that a psychiatric examination of a person convicted of any one or more of the crimes enumerated in section 39-19-1 is desirable, he shall appoint and designate the psychiatrist or psychiatrists to make such examination. The psychiatrists shall thereupon make such a psychiatric examination of the person so convicted either at a clinic, state hospital, or other institution so designated by the district court or at the place where such person is in temporary confinement, or it may request that he be brought to any clinic established by the State of Colorado for such purposes, or state hospital, or state, county, or private institutions.

39-19-5. Sentence—cost—place of confinement—(1) Whenever a district court, after psychiatric examination of and report on a person convicted of any one or more of the

crimes enumerated in section 39-19-1, shall be of the opinion that it would be to the best interests of justice to sentence such person under provisions of this article, he shall cause such person to be arraigned before him and sentenced to the Colorado State Penitentiary until such time as the State Board of Parole shall review the case or transfer to the appropriate institution as provided in section 39-19-6 of this article.

(2) The costs of maintenance of any person so convicted while in temporary confinement, and costs of transportation, including transportation to the Colorado State Penitentiary after sentence, and the costs of such an examination made by a psychiatrist designated by the district court, shall be borne by the county in which the crime has been committed.

(3) The district court is hereby authorized to grant probation to such person who has not been a previous sex offender, and to terminate such probation when maximum benefits have been obtained from supervision, and the authority to revoke probation and sentence as provided in this act if the person violates the terms of his probation.

(4) The provisions of 39-16-2 relating to the presentence investigation by the district court probation officer shall be applicable to all persons to be sentenced under the provisions of this article.

39-19-6. Periodic review by board of parole—(1) Within six months after a person shall have been sentenced under the provisions of this article for an indeterminate term having a minimum of one day and a maximum of his natural life, and at least every year thereafter, the Colorado State Board of Parole shall cause to be brought before it, with respect to each such person, all reports, records, and information concerning such person, for the purpose of determining whether such person shall be paroled, and it shall be the duty of the Board thereupon to make a ruling

with respect to each such person, who shall be notified in writing of such ruling.

(2) The State Board of Parole is hereby empowered and it shall be its duty to order the transfer of persons sentenced under the provisions of this article from the Colorado State Penitentiary to the State Hospital, the Reformatories, Industrial School, or any other appropriate State institution or facility, which the Board determines will best effectuate the purposes of this article and the Board shall have the further power to re-transfer such persons when necessary to provide treatment or proper custody, or to obtain current medical and psychiatric evaluation.

39-19-7. Parole board given control—when—The Colorado State Board of Parole is hereby granted exclusive control over the parole and reparole of persons sentenced under the provisions of this article, whether imprisoned in a penitentiary, or other state institution. The Board is hereby authorized and empowered to parole and reparole, and commit and recommit for violation of parole, any person sentenced under the provisions of this article. The Board shall have the further power to issue an absolute release from confinement to any person sentenced under the provisions of this article at such time and under such conditions as the interest of justice and the welfare of society may dictate. In considering the parole or reparole or an application for parole of any person sentenced under the provisions of this article, the Board shall give serious consideration to the original report and subsequent reports of the psychiatric examination of the person so sentenced and the recommendations contained in such reports.

39-19-8. General powers of board of parole—Except as otherwise provided in this article, the Colorado State Board of Parole shall have all the powers conferred and duties imposed upon it with respect to the parole of pris-

oners generally, in the parole and supervision of persons sentenced under the provisions of this article.

39-19-9. Application to persons now on parole—The provisions of this act are hereby extended to all persons who, at the effective date thereof, may be on parole, or eligible to be placed on parole under existing law, with the same force and effect as if this act had been in operation at the time they were placed on parole or became eligible to be placed thereon as the case may be.

39-19-10. State furnish services—It shall be the duty of the State of Colorado to furnish the psychiatric services provided for in this article and it shall be the duty of the institution where such persons are confined to furnish current reports, records, and recommendations, as may be required to assist the State Board of Parole in determining transfers, parole, or commitment of persons treated under the provisions of this article.